INDEX.

Motion to dismiss 1
I. Statutes involved 2
II. Statement 3
III. Argument 5
A. The judgment of the Supreme Court of Ohio rests on an adequate non-federal basis 5
B. The judgment of the Supreme Court of Ohio did not necessarily determine a federal question and, therefore, should not be reviewed by this court 7
IV. Conclusion 8

Cases Cited.

Ashley v. Ryan, 153 U. S., 436, 441; 38 L. ed., 773, 777..5, 6
Berea College v. Kentucky, 211 U. S., 45, 54; 53 L. ed., 81, 85 .....6, 7
Fox Film Corporation v. Muller, 296 U. S., 207, 210; 80 L. ed, 158, 159 7
Herb v. Pitcairn, 324 U. S., 117, 125; 89 L. ed., 789, 794 7
Home Insurance Company v. New York, 134 U. S., 594, 600; 33 L. ed., 1025, 1029.....5, 6

Maine v. Grand Trunk Railway Company, 142 U. S., 217, 228; 35 L. ed., 994, 995 ..... 5, 6
Murdock v. Memphis, 20 Wall., 590, 636; 22 L. ed., 429, 444 7
Prudential Insurance Company v. Cheek, 259 U. S., 530, 536; 66 L. ed., 1044, 1051 ..... 5, 6
Radio Station WOW, Inc., v. Johnson, 326 U. S., 120, 129; 89 L. ed., 2092, 2100 7
Rochester Railway Company v. City of Rochester, 205 U. S., 236, 255; 51 L. ed., 784, 792 6
The Horn Silver Mining Company v. State of New York, 143 U. S., 305, 313; 36 L. ed., 164, 168 6
Voeller v. Neilston Warehouse Company, 311 U. S., 531, 535; 85 L. ed., 322, 325 6
Yazoo & Mississippi Valley Railway Company v. City of Vicksburg, 209 U. S., 358, 365; 52 L. ed., 833, 835 6
Young v. Ragen, 337 U. S., 235, 238; 93 L. ed., 1333, 1336 7

Statutes Cited.

Revised Code of Ohio—
Section 2905.21 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 340.

THE STATE OF OHIO, EX REL. EDITH G. CHURCH, RALPH S. BROWN AND ALOIS S. KNAPP,

Appellants,

vs.

TED W. BROWN, AS SECRETARY OF STATE, STATE OF OHIO,

Appellee.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment and decree of the Supreme Court of Ohio be dismissed on the ground that the judgment rests on an adequate non-federal basis.

I.

STATUTES INVOLVED.

In the jurisdictional statement filed in the Supreme Court of the United States, the appellants have, on pages 6 and 7, quoted in full Section 2905.31, Revised Code of Ohio, which they believe and claim is, as applied to them, violative of or repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

In addition to Section 2905.31, Revised Code of Ohio, the pertinent language of the corporation law of Ohio is essential to any consideration of this appeal.

Section 1702.05, Revised Code of Ohio, was in effect on September 9, 1955, when the appellants submitted to the appellee, the secretary of state of the state of Ohio, the Articles of Incorporation of the proposed National Nudist Council, Incorporated. Section 1702.05, Revised Code of Ohio, then provided:

> "A corporation not for profit may be formed under sections 1702.05 to 1702.23, inclusive, of the Revised Code, for any purposes, not involving pecuniary gain or profit, for which natural persons may lawfully associate themselves, except that where the Revised Code make special provision for the filing of articles of incorporation of designated classes of corporations not for profit, such corporations shall be formed under such provision and not under sections 1702.05 to 1702.23, inclusive of the Revised Code."

The above-quoted section was repealed by Amended House Bill No. 70, 126 Ohio Laws, and present Section 1702.03, Revised Code, which became effective October 11, 1955, was enacted. The said Section 1702.03, Revised Code of Ohio, reads:

> "A corporation may be formed for any purpose or purposes for which natural persons lawfully may as-

sociate themselves, provided that when there is a special provision in the Revised Code for the formation thereunder of a designated class of corporations, a corporation of such class shall be formed thereunder."

As shown by Section 1702.01, Revised Code of Ohio, the words "corporation" as used in Section 1702.03, Revised Code of Ohio, means a non-profit corporation.

II.

STATEMENT.

The final judgment and decree of the Supreme Court of Ohio, from which this appeal is taken, denied these appellants a writ of mandamus requiring the secretary of state of the state of Ohio to accept for filing and recording certain articles of incorporation for a proposed corporation not for profit which was to be known as National Nudist Council, Incorporated. The purposes of this proposed non-profit corporation, as shown by Item III of the articles subscribed, acknowledged and presented by these appellants to the secretary of state, on September 9, 1955, were:

"A. To further the practice of nudism.

B. To promote and develop a strong nudist movement composed of member clubs and individual members.

C. To provide private facilities where members of both sexes may congregate together and in the presence of each other practice nudism without intrusion from or interference by the public.

D. To develop a program to enlighten the public on the benefits of social nudism.

E. To foster public health through the teaching and practices of physical and mental hygiene."

These articles of incorporation were refused by the secretary of state for the reason the corporations not for profit could then and may now be formed in Ohio only for those purposes for which natural persons lawfully may associate themselves. The purposes of this proposed non-profit corporation were and are, at least in part, directly prohibited by Section 2905.31, Revised Code of Ohio.

Following the refusal of the secretary of state to accept for filing and recording the said articles of incorporation, these appellants, as relators filed in the Supreme Court of Ohio a petition and an amended petition for a writ of mandamus requiring the said secretary of state to accept the articles presented and thus grant to the proposed corporation a corporate charter. The Supreme Court of Ohio sustained a demurrer to the petition and denied the writ of mandamus.

(The opinion of the Supreme Court of Ohio, which is reported in 165 Ohio St., 31, is set forth in full as the appendix of the jurisdictional statement filed on behalf of the appellants.)

III.

ARGUMENT.

A. The Judgment of the Supreme Court of Ohio Rests on an Adequate Non-federal Basis.

The specific relief requested in the Ohio Supreme Court, and there denied, was authority to form a corporation not for profit; any rights claimed by these appellants to practice and advocate nudism without the privileges and protection of the corporate form or organization were not there and are not here involved.

These appellants asserted in the petition filed in the Supreme Court of Ohio that they believe they have an inherent right both to practice nudism and to carry on a program designed to further the aims of the nudist movement within the state of Ohio. They then asserted that a non-profit corporation would be the most effective method of carrying out their purposes. There is, however, no inherent right to become a state corporation for any purpose.

The right to become a corporate entity is not an inherent or natural right.

Ashley v. Ryan, 153 U. S., 436, 441; 38 L. ed., 773, 777.

Prudential Insurance Company v. Cheek, 259 U. S., 530, 536; 66 L. ed., 1044, 1051.

The granting of the rights and privileges of the corporate form of organization rests entirely within the discretion of the state.

Home Insurance Company v. New York, 134 U. S., 594, 600; 33 L. ed., 1025, 1029.

State of Maine v. Grand Trunk Railway Company, 142 U. S., 217, 228; 35 L. ed., 994, 995.

Horn Silver Mining Company v. New York, 143 U. S., 305, 313; 36 L. ed., 164, 168.
Ashley v. Ryan, 153 U. S., 436, 442; 38 L. ed., 773, 777.

Those who seek and obtain a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force.

Rochester Railway Company v. City of Rochester, 205 U. S., 236, 255; 51 L. ed., 784, 792.
Yazoo & Mississippi Valley Railway Company v. City of Vicksburg, 209 U. S., 358, 365; 52 L. ed., 833, 835.

The privilege of becoming a corporation may be accompanied with such conditions as the legislature may deem most suitable to its interests and policy.

Maine v. Grand Trunk Railway Company, 142 U. S., 217, 228; 35 L. ed., 994, 995.
Home Insurance Company v. New York, 134 U. S., 594, 600; 33 L. ed., 1025, 1029.
The Horn Silver Mining Company v. State of New York, 143 U. S., 305, 313; 36 L. ed., 164, 168.
Ashley v. Ryan, 153 U. S., 436, 441; 38 L. ed., 773, 776.
Prudential Insurance Company v. Cheek, 259 U. S., 530, 536; 66 L. ed., 1044, 1051.

Conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national constitution.

Voeller v. Neilston Warehouse Company, 311 U. S., 531, 535; 85 L. Ed., 322, 325.

In creating a corporation a state may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike.

Berea College v. Kentucky, 211 U. S., 45, 54; 53 L. ed., 81, 85.

Such a statute may conflict with the federal Constitution in denying to individuals powers which they may rightfully exercise, and yet at the same time be valid as to a corporation created by the state.

Berea College v. Kentucky, 211 U. S., 45, 54; 53 L. ed., 81, 85.

B. The Judgment of the Supreme Court of Ohio Did Not Necessarily Determine a Federal Question and, Therefore, Should Not Be Reviewed By This Court.

In the *per curiam* opinion of the Supreme Court of Ohio it is said that Section 2905.31, Revised Code of Ohio, is a valid exercise of the police power. This, however, was not the basis of the judgment. The question presented, as is also said in the opinion, is whether or not the relators may form a non-profit corporation for purposes which are, at least in part, prohibited by statute. See the appendix, jurisdictional statement, page 22.

This court has consistently followed the principle that judgments of state courts will not be reviewed where they rest upon adequate and independent state grounds.

Murdock v. Memphis, 20 Wall., 590, 636; 22 L. ed., 429, 444.

Berea College v. Kentucky, 211 U. S., 45, 53; 53 L. ed., 81, 85.

Fox Film Corporation v. Muller, 296 U. S., 207, 210; 80 L. ed., 158, 159.

Herb v. Pitcairn, 324 U. S., 117, 125; 89 L. ed., 789, 794.

Radio Station WOW, Inc., v. Johnson, 326 U. S., 120, 129; 89 L. ed., 2092, 2100.

Young v. Ragen, 337 U. S., 235, 238; 93 L. ed., 1333, 1336.

IV.

CONCLUSION.

The state of Ohio has seen fit to restrict the purposes for which a corporation not for profit may be organized to those that could be lawfully entered into by an association of natural persons. These appellants do not attack this requirement; indeed they could not. They, rather, take the somewhat unique position that a criminal law of Ohio enacted under the police power of the state must be swept aside so that the proposed purposes will no longer be unlawful; they are seeking a grant of authority from the sovereign to do that which the sovereign has forbidden.

We respectfully submit, therefore, that the judgment and decree of the Supreme Court of Ohio rests upon an adequate non-federal basis and that this appeal should be dismissed.

Respectfully submitted,

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SEP 28 195
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In The

Supreme Court of the United States

October Term, 1956

NO. 340

STATE OF OHIO, EX REL. EDITH G. CHURCH,
RALPH S. BROWN, ALOIS S. KNAPP,

Appellants,

v.

TED W. BROWN, AS SECRETARY OF STATE,
STATE OF OHIO,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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INDEX TO CASES

Page

Adams Express Co. v. Iowa,
196 U. S. 147, 25 S. Ct. 185, 49 L. Ed. 424 9

Dickinson v. Stiles,
246 U. S. 631, 38 S. Ct. 415, 62 L. Ed. 908 5

Eureka Pipe Line Co. v. Hallanan
257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227 7

Irving Trust Co. v. Day
314 U. S. 556, 62 S. Ct. 398, 86 L. Ed. 452 7

Kramer v. State ex rel Moore
45 Ohio App. 389, 187 N. E. 256 10

N. Y. ex rel Bryant v. Zimmerman
278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184 7

Pratt-Low Preserving Co. v. Jordan
217 Cal. 292, 18 P(2nd) 676 11

Schuykill Trust Co. v. Pennsylvania
296, U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91 6

State ex rel Gongwer v. Graves
90 O. S. 311, 107 N. E. 1018 10

State ex rel Steubenville Gas Co. v. Taylor
55 O. S. 61, 44 N. E. 513 11

Williams v. Kaiser
323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398 9

INDEX TO LEGAL PERIODICALS

12 Ohio Jur. 2d 77 8

In The

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NO. 340

STATE OF OHIO, EX REL EDITH G. CHURCH, RALPH S. BROWN, ALOIS S. KNAPP,

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Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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Pursuant to Rule 16 (3), Revised Rules of the Supreme Court of the United States, Appellants do file this brief in opposition to Appellee's Motion to Dismiss.

ARGUMENT

Rule 16 (1) (b) of this court reads as follows:

> "The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the Judgment rests on an adequate non-federal basis."

On pp. 5 and 7 of his motion to dismiss, Appellee lists two arguments in support of his contention, which are as follows:

> "A. The Judgment of the Supreme Court of Ohio rests on an adequate non-federal basis."
>
> B. The Judgment of the Supreme Court of Ohio did not necessarily determine a federal question and, therefore, should not be reviewed by this court."

It is interesting to note that Appellee did not question the contention contained in pp. 13 through 19 of Appellant's Jurisdictional Statement that substantial and important federal questions were involved in this appeal, therefore leaving unchallenged the most important reason for assumption of jurisdiction by the Supreme Court of the United States. Nor does the motion contain any charge that the federal question was not timely or properly raised.

In examination of the arguments put forward by Appellee, we consider first Argument B on p. 7 of the motion, which states that the judgment below "did not necessarily determine a federal question." Rule 16 (1) (b)

above quoted, does not list among the grounds for receiving a motion to dismiss the fact that the court below "did not necessarily determine a federal question." It is presumed that Appellee means that the federal question was not "expressly passed on." A determination of this problem first calls for an inquiry as to whether the federal constitutional issues were drawn in question. In Dickinson v. Stiles, 246 U. S. 631, 38 S. Ct. 415, 62 L. Ed. 908, is the following language:

> "Where the federal claim was called to the attention of the trial court and discussed by the state appellate tribunal, it was sufficiently raised and drawn in question."

In the Appendix to Appellant's Jurisdictional Statement on pp. 21 & 22 appears the following paragraph taken from the opinion delivered by the Supreme Court of Ohio:

> "Relators contend that the section is unconstitutional being in direct violation of the First and Fourteenth Amendments to the Federal Constitution and Sections 1, 2, 3 and 11 of Article I of the Ohio Constitution; that relators have a basic right to assemble as nudists with others of like belief; that, their assemblage being peaceable in nature, the above-quoted section is violative of the federal and state constitutions and operates in such a manner as to abridge the rights of freedom of speech, freedom of the press, and peaceable assembly given by the Constitutions; and that the law is partial in its operation and unduly oppressive."

Employing the test of the Dickinson case supra, it is submitted that the federal constitutional issues were drawn in question, which leads to the next inquiry as to whether the issues were then "expressly passed on." Continuing to quote from the opinion rendered by the court below, on p. 23 of the Jurisdictional Statement, we fined as follows:

> "The enactment of Section 2905.31, Revised Code, was a valid exercise of the police power.

> " 'In determining the constitutionality of the statute, as measured by the police power, we need only to inquire whether this statute is an unreasonable, arbitrary, and oppressive exercise of the police power, and whether it is really designed to accomplish a purpose falling within the scope of the police power. Every reasonable presumption is indulged in favor of its constitutionality, and if the statute bears any reasonable relation to the public welfare and public morals the courts may not declare it to be invalid.' Davis v. State, 118 Ohio St., 25, 160 N. E. 473."

The fact that the court specifically enumerated and acknowledged the federal constitutional questions raised by Appellants and proceeded to state that the statute in question was a valid exercise of the police power, with reasons therefor, would seem to make untenable the position that the federal constitutional questions were not "expressly passed on."

Appellee makes reference to that part of the courts opinion found on p. 22 of the Jurisdictional Statement, and which reads as follows:

> "The merits of Nudism as a doctrine of life need not be considered in deciding this case. The question presented is whether Relators may form a non-profit corporation to carry on activities, which are, at least in part, prohibited by statute."

The paragraph just above quoted is in no way decisive of the issue of whether federal questions raised below were "expressly passed on." Such a determination is itself a federal question to be decided by the Supreme Court of the United States from the record before it. Schuykill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91. The Supreme Court is not bound by the reasons assigned by the state court nor grounds upon which the decision is based, nor is it limited to consideration of the

language of the state decision. Irving Trust Co. v. Day, 314 U. S. 556, 62 S. Ct. 398, 86 L. Ed. 452.

In N. Y. ex rel Bryant v. Zimmerman, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184, it was held regarding the question here under discussion that if the necessary effect of a state court judgment was to deny a federal claim, that the terms in which the ruling was put are immaterial. In Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227, is found authority for the proposition that if a state statute is upheld and enforced as against a federal claim, that the matter is reviewable by this court, regardless of the grounds on which the decision of the lower court rested.

Applying the rules above stated to the case at hand, it is undeniable from the record before us that the Appellants herein did assert federal rights. The Court below did note in the record that these rights had been asserted. The end result of the decision in this case was to deny the federal claims put forward by the Appellants. On being examined in its entirety, the record clearly shows that the federal constitutional issues were "expressly passed on" by the court below.

We now consider the other phase of Appellee's motion that the judgment of the Supreme Court of Ohio rested on an adequate non-federal basis.

Appellants contend first that the decision below was not based on a non-federal ground. Appellee's contrary view is based on the fact that Appellants, in the prayer of their petition, asked that the Secretary of State be compelled to accept the proffered articles of incorporation for filing and recording. Appellee then reasons that the specific relief requested is authority to incorporate and that the granting of corporate rights and privileges is at the

discretion of the state. Hence, Appellee feels that the case could be, and was, disposed of on state grounds alone.

The first observation in order is that the real issue in any type of litigation is seldom, if ever, found in the prayer of the petition or within the confines of the specific order requested. In a negligence case arising out of an automobile accident, for example, the prayer always asks for a certain amount of money for damages. The final order awarding an amount of money, however, is only a formality which must be preceded by a determination of fault, which is the real issue. Take next the case of a student who, though otherwise qualified, is refused admission to a university because of his race or color. When this student seeks to have the federal court compel the university to admit him, his prayer and specific order requested will be to compel the university to enroll him as a student. Whether the university will be ordered to enroll him is in no way the issue of the case, however, as a determination of the constitutional rights involved would of necessity precede and determine any order.

Turning to the case at hand, whether the Secretary of State of Ohio, the Appellee herein, should be compelled to accept for recording the proffered articles of incorporation is certainly not the issue. Whether the Appellee is or is not ordered to issue the articles would depend on the determination of the primary issue, viz., the constitutionality of Sec. 2905.31 of the Ohio Rev. Code. The Secretary of State of Ohio is a ministerial officer. He has no discretion over whether to grant or withhold issuance of a corporate charter, although it is true that he can refuse to accept articles for recording if there are discrepancies in form. As is stated in 12 Ohio Jur. 2d 77:

> "The duty of the Secretary of State with respect to the filing and recording of articles of incorporation is

said by the Supreme Court to be controlled by the statutes of the state. The discretion to be exercised by the Secretary of State does not reach the merits of the application for the articles of incorporation, although it may be exercised as to matters of form."

It is difficult, therefore, to follow Appellee's reasoning that an order to this official directing him to record articles of incorporation should be so elevated or should in any manner be granted the status of being a real issue in this case. Appellants contend, therefore, that the court below based its decision on the issue of the constitutionality of Sec. 2905.31 and deciding that the law was valid and was not unconstitutional, declined to order any performance by the Secretary of State.

Assuming, however, that it was the intention of the court below to rest its decision on a non-federal ground, we still have the question of whether or not the non-federal ground afforded an adequate basis for the decision. Some general considerations are first in order.

In Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398, it is stated that it will be presumed that the state court based its decision on federal grounds if independent state grounds were not a substantial or sufficient basis for the decision. In Adams Express Company v. Iowa, 196 U. S. 147, 25 S. Ct. 185, 49 L. Ed. 424, it was held that the state court cannot, by resting its decision on local law, defeat the appellant jurisdiction of the Supreme Court, where the federal claim, if recognized and enforced, would require a different judgment. The real issue here involved, then, may be stated as follows: Even if we assume that the court below intended to base its decision on a non-federal ground, was the non-federal ground adequate to support the judgment or decree in view of the Federal Constitutional rights which Appellants did assert? With these guiding princi-

ples and issues in mind, let us examine the facts of this case.

Appellants requested that Appellee accept certain articles of incorporation for filing and recording, the stated purpose of the proposed corporation being to further the practice of social nudism in the state of Ohio. Appellee's answer was that the stated purpose was illegal in Ohio, and consequently that he could only refuse the request of Appellants. Appellants then filed a petition in mandamus seeking to compel the Appellee to perform the requested act. Ohio law holds that mandamus is an appropriate remedy for compelling the Secretary of State to either perform a given act or show cause for refusal. State ex rel Gongwer v. Graves, 90 O. S. 311, 107 N. E. 1018. Appellee's answer was that Sec. 2905.31 of the Ohio Rev. Code made the practice of Nudism, the purpose of the proposed corporation, illegal, thereby, excusing Appellee from any duty to accept the articles for recording. This was the one and only reason ever put forward as a basis for denying the request of Appellants. Appellants then raised the issue that the statute in question, Sec. 2905.31 of the Ohio Rev. Code, (set out in full on pp. 6 and 7 of the Jurisdictional Statement) was repugnant to various provisions of the constitution of the United States. Kramer v. State, ex rel Moore, 45 Ohio App. 389, 187 N. E. 256, holds that the constitutionality of a statute may be raised in a mandamus proceeding where the right to the issuance of the writ depends on a determination of the question, and the statute affirmatively imposes or excuses the performance of some duty.

The court, therefore, had before it a Federal Constitutional issue, to wit, whether Sec. 2905.31 of the Ohio Rev. Code was repugnant to various provisions of the Constitution of the United States. This issue was placed before the

Supreme Court of the State of Ohio pursuant to and in accordance with Ohio procedural law and no objection is in the record opposing the timeliness or the manner in which this issue was brought before the court. The supposed non-federal ground on which the court could at this point dispose of the case involved the state's authority on granting or withholding corporation privileges. The ultimate decision was that Appellants request to have Appellee perform the act was denied. Could this decision have rested on the non-federal ground alone? There is ample support for a negative answer.

If the federal issue had been decided in favor of Appellants, and Sec. 2905.31 of the Ohio Rev. Code declared unconstitutional, then Appellee could no longer have said to Appellants that the purpose of the proposed corporation was illegal. The only reason which Appellee had forwarded as the basis for refusing Appellants request would have disappeared. The Secretary of State, the Appellee herein, could no longer have showed cause why he should not accept the articles. It should be noted that the discretion in corporate matters belongs to the state but not to the Secretary of State. In State ex rel Steubenville Gas Company v. Taylor, 55 O. S. 61, 44 N. E. 513, it is stated that if articles are tendered to the Secretary of State for filing and are in proper form and show compliance with the law, it is the duty of the Secretary of State to file and record the same, and in case of his wrongful refusal, mandamus will lie. See also Pratt-Low Preserving Company v. Jordan, 217 Cal. 292 18 P(2d) 676. On the other hand, in deciding against Appellants on the constitutional issue by upholding the validity of Sec. 2905.31 of the Ohio Rev. Code, the court below had a logical basis for its ultimate decision. The reason affording the Appellee an excuse for not performing the requested act of Appellants still stood, and consequently, no writ would be issued to compel Ap-

pellee to perform.

Appellants, therefore, conclude that even if it had been the intention of the court below to rest its decision on a non-federal basis, that such grounds would not furnish an adequate basis for the decision.

CONCLUSION

Appellants conclude that the distinguished court below expressly passed on federal constitutional issues which were raised and did decide in favor of the validity of a state statute against the claim that it was repugnant to the Constitution of the United States. Appellants further conclude that even if the court below had intended to rest its decision on a non-federal ground that such ground would not be adequate to support the decision.

Having been denied protection of their federal rights by the state court of Ohio, the Appellants herein can never be said to have had their "day in court" until the Supreme Court of the United States has passed on the merits of their case. It is respectfully submitted that this court can only fulfill its allotted constitutional function by assuming jurisdiction and affording Appellants an opportunity to present the real merits of their case.

Respectfully submitted,

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